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Howard J. Symons

Direct dial 202 434 7305
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December 9, 2003

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Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Notice of Ex Parte Presentation
<u>MB Docket No. 03-124</u>

Dear Ms. Dortch

On December 8, 2003, on behalf of Cablevision Systems Corporation ("Cablevision"), Michael Olsen of Cablevision, Tara Corvo of Mintz, Levin and the undersigned met at separate times with Jon Cody of Chairman Powell's office; Johanna Mikes-Shelton of Commissioner Adelstein's office; Jennifer Manner of Commissioner Abernathy's office; and Jordan Goldstein of Commissioner Copps's office to discuss the above-referenced proceeding.

Cablevision argued that the record evidence in this proceeding confirms that a Fox-DirecTV merger will heighten News Corp.'s ability and incentive to engage in temporary foreclosure during retransmission consent negotiations, and discussed potential ways to remedy News Corp.'s anticompetitive leverage in those negotiations. Cablevision also distributed the attached handout.

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Pursuant to section 1 1206(b)(2) of the Commission's rules and the terms of the Second Protective Order entered in this proceeding, the original and one copy of this letter and the handout are being filed with the Office of the Secretary. Copies are also being served on Commission personnel One copy of the Highly Confidential version of this filing has been filed with the Office of the Secretary.

Sincerely,

Howard J Symons

cc: Marcia Glauberman
Linda Senecal
Jon Cody
Johanna Mikes-Shelton
Jennifer Manner
Jordan Goldstein

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RECORD EVIDENCE CONFIRMS THAT A FOX-DIRECTV MERGER WILL HEIGHTEN NEWS CORP.'S ABILITY AND INCENTIVE TO ENGAGE IN TEMPORARY FORECLOSURE

Cablevision Systems Corporation ("Cablevision") argued in its initial comments in this proceeding that "the unique combination of the Fox broadcast network and DirecTV will enable News Corp. to demand even higher compensation for its broadcast station from Cablevision due to Fox's ability to make a substantial and credible threat to walk away from negotiations and air its broadcast programming only on DirecTV."[1/]

Cablevision's initial analysis is supported by the record that has since been developed in this proceeding. The evidence confirms that, as Cablevision and others predicted, an unconditioned merger would "shift retransmission consent negotiations in favor of Fox and against unaffiliated MVPDs and their customers."[2/] A merger with DirecTV would heighten

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[1] *Application of General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee, For Authority to Transfer Control*, MB Docket No. 03-124, Comments of Cablevision Systems Corp. ("Cablevision Comments") at 12.

[2] *Id.*; *see* American Cable Association Comments at 9-13 ("Absent specific constraints on the proposed combination, News Corp. can direct Fox Television Holdings and Fox Cable Networks to impose onerous and costly retransmission consent terms and conditions"), Joint Cable Commenters at 29-34 ("After the merger, a cable operator that fails to comply with News Corp.'s retransmission consent terms and conditions demands could risk providing DirecTV with a de facto exclusivity for Fox networks and local programming in that operator's market."), EchoStar Petition to Deny at 19-21 (" ... the new and novel circumstances presented by the News Corp./Hughes conglomerate, and the self-evident economic incentive to muscle other distributors into an uncompetitive position and raise its fees from retransmission, demand a more vigilant regime.")

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News Corp.'s ability to engage in temporary foreclosure, raising cable rates, and the evidence shows not only that News Corp. is likely to do so based on past behavior, but that doing so post-merger will be profitable.

A Credible Threat of Temporary Foreclosure Will Lead to Higher Cable Rates. While News Corp. has always had the ability to withhold retransmission consent, the merger would significantly add to its leverage by giving it a guaranteed distribution platform for its Fox broadcast stations if cable operators refuse to accede to unreasonable demands for compensation. Cable operators will be forced to comply with News Corp. demands or risk losing popular Fox network programming to DirecTV. DirecTV is uniquely suited to provide this leverage because in contrast to overbuilders -- who generally serve only portions of cable operators' service areas and could not offer News Corp. an immediate, alternative route to all potential subscribers -- DBS has the immediate, extensive subscriber coverage that would enable such a strategy to succeed.

The potential consequences of this strategy are severe. Consumers will bear the higher costs of retransmission consent made possible by the merger, in the form of both higher cable rates and diminished subscriber choice on cable.[3/] Significantly, the foreclosure strategy would only need to be deployed in a few markets to present a credible threat to cable operators across the country.[4/]

Record Evidence Shows That [REDACTED]

. The documents produced by News Corp. in this proceeding demonstrate that

[REDACTED]

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3 Cablevision Comments at 4, 8, 15.

4 *See* Daniel L. Rubinfeld and Duncan Cameron, An Economic Analysis of the News Corp./DirecTV Transaction - Presentation to the Federal Communications Commission 8-11 (Aug. 19, 2003); *see also* Letter from Tara M. Corvo, Counsel, Cablevision Systems Corporation, to Marlene H. Dortch, Notice of Ex Parte Presentation, MB Docket No. 03-124, at 1 (Aug. 20, 2003).

[REDACTED]

The documents also reveal that

[REDACTED]

The danger posed by News Corp.'s increased leverage gained through the merger is magnified further because

[REDACTED]

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[REDACTED]

For new distributors entering the market, like Cablevision's DBS service, Voom, this leaves open the very real possibility that **[REDACTED]**

This would be an unacceptable result for a new service fighting for subscribers. Even if News Corp. offers Voom the same retransmission consent deal it offers DirecTV, there is nothing to prevent it from entering into "sweetheart deals" with DirecTV and using the inflated result as the standard for a "reasonable" price.[5/]

The Record Evidence Shows That [REDACTED].
Cablevision's economic experts, Professor Daniel Rubinfeld of the University of California at Berkeley and LECG and Dr. Duncan Cameron of LECG, have demonstrated that even using the merger parties' economists' own methodology, a strategy of temporarily withholding Fox broadcast programming would be profitable for News Corp. post-merger if DirecTV gained only a very small (less than 1%) increase in market share as a result. Professor Rubinfeld and Dr. Cameron have also established that the strategy would only need to be deployed in a few markets to present a credible threat to cable operators across the country.[6/]

[REDACTED]

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5 Cablevision Comments at 2, 29.

6 *See* Daniel L. Rubinfeld and Duncan Cameron, An Economic Analysis of the News Corp./DirecTV Transaction - Presentation to the Federal Communications Commission 8-11 (Aug. 19, 2003); *see also* Letter from Tara M. Corvo, Counsel, Cablevision Systems Corporation, to Marlene H. Dortch, Notice of Ex Parte Presentation, MB Docket No. 03-124, at 1 (Aug. 20, 2003).

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